IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1979
No. 78-1911

ROB'T L. GUYLER CO.
In Its Own Behalf and On Behalf of
THE McCARTY CORPORATION,
Petitioner

v.

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

William D. Bryce
Attorney at Law
709 Brown Building
Austin, Texas 78701

Attorney for Petitioner

INDEX

CASE CITATIONS

TEXT

IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1979

No. _____

ROB'T L. GUYLER CO.
In Its Own Behalf and On Behalf of
THE McCARTY CORPORATION,
Petitioner

v.

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF CLAIMS

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner, ROB'T L. GUYLER COMPANY, in its own behalf and on behalf of The McCarty Corporation, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Claims rendered in these proceedings on February 12, 1979, and which became final on April 6, 1979, the date of the Court of Claims denial of Petitioner's motion for rehearing.

OPINIONS BELOW

The opinion of the Armed Services Board of Contract Appeals appears at Appendix A, infra., and is reported at ASBCA No. 20278, 76-BCA para. 11, 893. The Board's opinion on motion for reconsideration appears at Appendix B, infra., and is reported at 76-2 BCA para. 12, 061.

The Opinion of the United States Court of Claims, as yet unreported, appears at Appendix C, infra., and its order denying Plaintiff's motion for rehearing, as yet unreported, appears at Appendix D, infra.

JURISDICTION

The order or judgment of the United States Court of Claims was entered on February 21, 1979. See Appendix C, infra. Petitioner's motion for rehearing was denied by the Court of Claims' order on April 6, 1979 (see Appendix D, infra.), and this petition for writ of certiorari was filed less than 90 days thereafter. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1255(1).

QUESTIONS PRESENTED

Petitioner, a successful bidder for government construction work, brought suit to recover the value of equipment furnished to the government under protest. The questions thereby arising are:

1. Whether the United States Court of Claims violated Article One, Section One of the United States Constitution, which vests "all legislative

Power in the Congress", by refusing to apply a federal statute as written, and then creating and imposing the Court's own conditions for obtaining the relief provided by the federal statute, which conditions are not found in the statute itself (Section 2305(b), Title 10, United States Code (1970)), thus wrongfully denying Petitioner the benefit and protection of the statute.

2. Whether the United States Court of Claims misconstrued and failed to apply a federal statute which provides Petitioner the relief it seeks in this cause (Section 2305(b), Title 10, United States Code (1970)), thus wrongfully denying Petitioner the benefit and protection of the statute, as a matter of logic and as a matter of law.

3. Whether the United States Court of Claims erred in refusing Petitioner the benefit and protection provided Petitioner by the Armed Services Procurement Regulations.

4. Whether the United States Court of Claims erred in refusing Petitioner relief under one or more of the established and recognized rules of federal contract law relied upon by Petitioner.

CONSTITUTIONAL PROVISION INVOLVED

The Constitution of the United States, Article One, Section One:

> "All legislative Power herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."

FEDERAL STATUTE INVOLVED

Section 2305(b), Title 10, United States Code (1970):

> "(b). The specifications in invitations for bids must contain the necessary language and attachments, and must be sufficiently descriptive in language and attachments, to permit full and free competition. If the specifications in an invitation for bids do not carry the necessary descriptive language and attachments, or if those attachments are not available to all competent bidders, the invitation is invalid and no award may be made."

ARMED SERVICES PROCUREMENT REGULATIONS INVOLVED

The following 1973 Armed Services Procurement Regulations are involved, which, due to their length, are set out in Appendix E hereto, in accordance with Rule 23, 1(d):

> ASPR 1-1206.1(a), 32 CFR 157; ASPR 1-1206.2, 32 CFR 158; ASPR 1-1206.3, 32 CFR 159; ASPR 18-107, 32 CFR 313; ASPR 1-1206.4(b), 32 CFR 160; ASPR 1-1203.3, 32 CFR 156; ASPR 2-101(a), 32 CFR 192; ASPR 1.1202(b) and (c), 32 CFR 154-155.

STATEMENT OF THE CASE

The facts relevant to the questions presented by this petition are uncontroverted, and may therefore be introduced to the Court in a summary fashion. At issue is whether the Government or Petitioner is to pay for four hundred G.E. Model GSS200 Space Saver electric kitchen dishwashers purchased under protest and installed by Petitioner in a rehabilitation project for Government housing units at Ft. Bragg, North Carolina.

In 1974, Petitioner Rob't L. Guyler Co. responded to the Government's invitation for bids for the rehabilitation of 540 federal housing units at Fort Bragg, North Carolina. Various subcontractors were used by Petitioner, and each of them prepared their portion of Petitioner's bid as general contractor. The subcontractor responsible for work under the plumbing section was The McCarty Corporation, and its president, Mr. W. H. McCarty, prepared the plumbing section bid based upon the Government's amended invitation for bids. Mr. McCarty read the amended invitation for bids but did not interpret it to require him to include dishwashers in his subcontractor bid. Another corporation bidding the job - Community Builders, Inc. - also did not include dishwashers in its bid. Northeast Construction Co., the third corporation which contributed to the record, did include dishwashers in its bid, but only after its bid drafter telephoned a friend who worked for General Electric and got from him a specification not included in the Government's invitation for bids.

Petitioner's vice-president, Mr. Lance Walker, assembled the subcontractors' bids and prepared Petitioner's overall bid as general contractor, relying as usual upon his subcontractors

to prepare their portions of the overall bid. This is the practice in the trade or industry (Tr., p. 37). Petitioner was the low bidder, and was awarded the job.

After work began, the Government demanded that Petitioner purchase and furnish 400 dishwashers not included in Petitioner's bid. The Government also, for the first time, provided the necessary descriptive language for a dishwasher which the Government said would meet its requirements: the General Electric Model GSS-200 Space Saver automatic electric dishwasher.

The McCarty Corporation then purchased and provided 400 such dishwashers to the Government under protest. The McCarty Corporation then made a claim to the Government through Petitioner for an equitable adjustment on the grounds that the Government's amended bid invitation did not require Petitioner to furnish such dishwashers, and thus no allowance for dishwashers had been included in Petitioner's bid. The contracting officer denied the claim.

The Petitioner then on its own behalf and on behalf of The McCarty Corporation, timely appealed to the Armed Services Board of Contract Appeals. The agreed cost of the dishwashers is $83,000.00.

After a hearing at which documentary evidence was introduced and witnesses were examined, the Armed Services Board of Contract Appeals denied Petitioner's claim for an equitable adjustment. Petitioner timely perfected an appeal to the United States Court of Claims, the basis for jurisdiction in that Court being 41 U.S.C., Sections 321-322. The United States Court of

Claims affirmed the Board's decision, and overruled Petitioner's motion for rehearing and reargument. This petition for writ of certiorari resulted.

REASONS FOR GRANTING THE WRIT

I.

The decision of the United States Court of Claims denying Petitioner the benefit of a federal statute is void as a matter of logic and as a matter of law.

The decision of the United States Court of Claims is based upon material error as a matter of logic. The Court of Claims has committed the folly of circular reasoning as follows:

Section 2305(b), Title 10, United States Code (p. 5, supra.) is the federal statute which controls invitations for bids. It is one of the statutes which are "the basic provisions governing all procurement by the Armed Services out of appropriated funds." (Douglas, J. in Paul v. U.S., 371 U.S. 245, 255, 83 S.U. 426, 9 L.Ed. 2d 292 (1963)).

Section 2305(b) requires this:

> "If the specifications in an invitation for bids do not carry the necessary descriptive language and attachments, or if those attachments are not available to all competent and reliable bidders, the invitation is invalid and no award may be made."
> (p. 5, supra.)

Despite this, the Court of Claims said:

> "That statutory provision [Section 2305(b)] fails to provide any basis upon which a successful government contract bidder may escape the adverse financial consequences of his failure to read and understand a clear contractual requirement." (P. 12, Court of Claims Opinion, Appendix C).

This is circular reasoning by the Court of Claims, because the conclusion is presumed in the premise. In effect, the Court of Claims has said: "Since there is a clear contractual requirement, the statute which determines whether there is a clear contractual requirement does not apply."

The Court of Claims thus erred as a matter of logic, and its resulting holding that the statute is not available to protect Petitioner is thus error as a matter of law.

II.

The United States Court of Claims invaded the province of the Congress by creating and imposing three conditions for relief under Section 2305(b), Title 10, United States Code. This violates Article One, Section One of the United States Constitution which vests "all legislative Power" in the Congress.

These are the three judicial conditions which the Court of Claims has created and which will now be required of all bidders seeking the

protection of Section 2305(b):

> 1. First, bidders must now "read" the invalid contractual provisions of the statutorily invalid bid invitation (P. 12, Ct. Claims Opinion, Appendix C).
>
> 2. Next, bidders must now "understand" the invalid contractual provisions of the statutorily invalid bid invitation (P. 12, Ct. Claims Opinion, Appendix C).
>
> 3. Finally, bidders now have an "affirmative obligation to inquire" about conflicts within the statutorily invalid bid invitation (Pp. 10, 11, Ct. Claims Opinion, Appendix C).

The Court of Claims erred in giving birth to these three conditions for obtaining protection under Section 2305(b), because the statute itself does not impose any of these conditions upon bidders for such protection. This is a classic invasion of the legislative process by the judiciary. It is a violation of Article One, Section One of the United States Constitution, which vests "all legislative Power in a Congress of the United States" (P. 4, supra.) Stanard v. Olsen, 74 S.Ct. 768, 370 U.S. 498, 8 L.Ed. 2d 653 (It is for the Congress, not the Courts, to write the law); and U.S. v. Thirty Seven (37) Photographs, 91 S.Ct. 1400, 28 L.Ed. 2d 822, Rehearing denied 91 S.Ct. 2221, 403 U.S. 924, 29 L.Ed. 2d 702 (The Courts may

not re-write a statute).

According to the statute, bidders are not required to read, or understand invalid bid invitation material, nor do they have any affirmative duty to inquire about invalid bid invitation material. The statute makes the bid invitation "invalid". Period. But the Court of Claims nevertheless makes the bid invitation valid unless the three court-imposed conditions are met. This is an invasion of the legislative process by the judiciary in violation of Article One, Section One of the Constitution. Where, as here, the bidder was not aware of any dishwasher requirement, nor of any contractual discrepancies, the bidder is entitled to the protection of the statute and the Court of Claims erred in holding to the contrary and in forcing the Petitioner to contribute $83,000.00 worth of dishwashers to the Government, despite the statute to the contrary.

III.

The Government provided no attachments describing dishwashers in the invitation for bids, and the specifications in the invitation for bids do not contain the necessary language and are not sufficiently descriptive in language to permit full and free competition between bidders as required by Article 2305(b), Title 10, United States Code.

In the present case, the Government failed to provide "Attachments" pertaining to dishwashers. The Government then selected this language as the specifications in the invitation for bids to describe the dishwashers it wanted: "special", " 'under the sink' type", and "undersink". The Court of Claims has held that these words are a specification

sufficiently descriptive in language to enable bidders to compete for the providing of four hundred dishwashers such as the General Electric Model GSS-200 electric dishwashers provided to the Government under protest in this case. This was error as a matter of law. The word "special" means the Government had particular, but undescribed, items of manufactured equipment in mind; " 'under the sink' type" and "undersink" fail to tell bidders what the Government means. As a matter of law, those words fail to advise bidders what to include in their bids; those words are not "sufficiently descriptive in language" to "permit full and free competition" as required by 2305(b).

Since the specifications thus do not meet the requirements mandated by 2305(b), then under the terms of that statute "the invitation is invalid and no award may be made", and the Government is not entitled to dishwashers as a matter of statutory law (Article 2305(b)). The Court of Claims erred in holding that the invitation is valid and in allowing the award to be made.

V.

The holding of the Court of Claims conflicts with, and is in violation of, the Armed Services Procurement Regulations which arise from and give effect to Section 2305(b), Title 10, United States Code.

In obedience to the mandate of Congress set out in Section 2305(b), Title 10, United States Code (quoted in Paragraph I, above), the Armed Services Procurement Regulations require certain descriptive language to be used by the government in its invitations for bids. These ASPRs have the force and effect of federal statutes. Goldwasser v. U.S., 325 F.2d 722, 163 Ct.Cls. 450. The ASPRs govern bidding procedures and awards for Armed Service Procurement Contracts. They have the force of law. Paul v. U.S., 371 U.S. 245, 255, 83 S.Ct. 426, 9 L.Ed. 2d 292 (1963). These ASPRs are laws which govern the award and interpretation of contracts as fully as if made a part of the contract. Chris Berg, Inc. v. U.S., 426 F. 2d 314, 192 Ct.Cl. 176. Their application is mandatory. Ainslie Corp. v. Middendorf, D.C. Mass., 381 F. Supp. 305. They are discussed below. It will be seen that in each instance the government's descriptive language of "special", " 'under the sink' type dishwashers" and "undersink dishwashers" fails to meet the plain and clear requirements of the ASPRs. Specifications in invitations for bids are required by federal law to:

1. Show "electric data", "dimensions, size or capacity", "principles of operation", and identify the equipment "by use of brand name followed by the words 'or equal' " (ASPR 1-1206.1(a)).	"Special", " 'under the sink' type" and "undersink" does not comply.

2. Include this information: "Where feasible, all known acceptable brand name products should be referenced" (ASPR 1-1206.2).	"Special", " 'under the sink' type" and "undersink" does not comply.
3. Include "model, make or catalogue number", "name of manufacturer", and "catalogue description" (ASPR 1206.2).	"Special", " 'under the sink' type" and "undersink" does not comply.
4. Provide bidders the "manufacturer's name", the "brand" and the "No." (ASPR 1-1206.3).	"Special", " 'under the sink' type" and "undersink" does not comply.
5. "Encourage maximum competition" (ASPR 1-1201(a)), and describe the government's requirements "clearly, accurately and completely" (ASPR 2-101(a)).	"Special", " 'under the sink' type" and "undersink" does not comply.
6. Make sure that "the technical provisions of construction specifications be in sufficient detail so that, when used with the applicable drawings and the specifications and standards incorporated by reference, bids can be prepared on a fair and competitive basis" (ASPR 18-107).	"Special", " 'under the sink' type" and "undersink" does not comply.

7. See to it that award documents "... identify, or incorporate by reference an identification of, the specific products which the contractor is required to furnish. Such identification shall include any brand name and make or model number, descriptive material, and any modifications of brand name products specified in the bid" (ASPR 1-1206.4(b)).	"Special", " 'under the sink' type" and "undersink" does not comply.
8. Provide proper dishwasher "specifications and standards", such to be "furnished with the solicitation" as required by ASPR 1-1203.3.	"Special", " 'under the sink' type" and "undersink" does not comply.
9. Provide an adequate "purchase description" as described in ASPR 1-1206.1 (a).	"Special", " 'under the sink' type" and "undersink" does not comply.

(NOTE: The foregoing ASPRs are reproduced in Appendix E hereto).

These ASPRs were, as a matter of law, not obeyed by the government and thus, as a matter of law, under Article 2305(b) "the invitation is invalid and no award may be made". This is all the Court of Claims said about these ASPRs:

> "Those provisions need not be discussed in any detail. Most of the sections cited simply do not apply here, and no breach of any relevant provision of ASPR has been shown" (p. 12, Court's Opinion, Appendix C).

In this, the Court erred as a matter of law. The ASPRs do apply. But even assuming for the sake of argument that the Court is correct in saying that "most" do not apply, then the Court agrees that some do apply. Since a breach of the relevant provisions of each ASPR is quite obvious (see above) the Court erred as a matter of law in denying Petitioner relief.

V.

The Court of Claims erred in refusing Petitioner relief on any of nine (9) familiar principles of contract law long recognized and applied in federal contract cases.

The Government violated the following nine (9) rules of contract law heretofore uniformly recognized and given effect by the federal courts:

> 1. Petitioner was misled to its detriment by the amended invitation for bids, because the Government falsely (by its own admission) assured bidders that furnishing dishwashers was "related work not included" in the section where they were included (Pp. 3-5, Court of Claims Opinion, Appendix C) (Albert and Harrison v. U.S., 68 F. Supp. 732, 107 Ct. Cl. 292,

Cert. Den. 675, Ct. 1199, 331 U.S. 810, 108 Ct. Cl. 761, 91 L. Ed. 1830)

2. Since some bidders asked questions regarding dishwashers, but the Government failed to clarify its requirements for dishwashers before the contract was awarded, unjust enrichment to the Government has resulted. (Universal Transistor Products Corp. vs. U.S., 241 F. Supp. 486)

3. There was no meeting of the minds of the parties due to the Government's errors recited herein. (Templeton Patents, Limited vs. J. R. Simplot Co., 336 F. 2d 261)

4. The Government's terminology regarding dishwashers is so vague and indefinite that the reference to dishwashers is void for want of particularity. (V. Soske vs. Barwick, 404 F. 2d 495, Cert. den. 89 S. Ct., 1197, 394 U.S. 921, 22 L. Ed. 2d 454)

5. It is not possible to acertain the intendment of the Government from the four corners of the amended bid invitation, due to the Government's errors. ("It is not enough that the parties think that they have made a contract; they must have expressed their intentions in a manner that is capable of understanding. It is not even enough

that they have actually agreed, if their expressions, when interpreted in the light of accompanying circumstances, are not such that the court can determine what the terms of that agreement are. Vagueness of expression, indefiniteness and uncertainty as to any of the terms of an agreement have often been held to prevent the creation of an enforceable contract." Corbin on Contracts, Section 95, Page 394

6. The key clauses of the Government's amended invitation for bids are in fatal, material and irreconcilable conflict. (Frank Sullivan Co. vs. Midwest Sheet Metal Works, 335 F. 2d 33)

7. The phrases used by the Government do not describe the dishwashers provided under protest by Petitioner, and undescribed items can form no part of a contract. (Willowood Condominium Assn. Inc. vs. HNC Realty Co., 531 F. 2d 1249 (1976).

8. The Petitioner is entitled to recover under the doctrine of estoppel by representation. (Cushing vs. U.S., D.C. Mass. 18 F. Supp. 83, 85)

9. Petitioner's bid was prepared without including an allowance for dishwashers; if this was a mistake,

such was occasioned by the Government's errors and the Government is liable for the consequences. (U.S. ex rel. Whitaker v. Callaway, 371 F. Supp. 585, affirmed 510 F. 2d 971)

The Court of Claims erred in its blanket refusal to apply any of these rules of contract law heretofore uniformly given effect by the federal courts. The Supreme Court should vindicate these basic contract law principles upon which federal commercial law depends for much of its structure and form.

VI.

The foregoing errors of the contracting officer, the Armed Services Board of Contract Appeals, and the United States Court of Claims are numerous and material, and Petitioner is entitled to the protection of the federal statutes and the Armed Services Procurement Regulations enacted for the benefit and protection of bidders such as Petitioner.

This case is one of the few reported cases in which the protection of Section 2305(b), Title 10, United States Code, and the Armed Services Procurement Regulations have had to be invoked by a government contract bidder. The cases cited by the Board of Contract Appeals and the Court of Claims do not apply, because those cases involve ambiguities or conflicts between two or more otherwise valid contract requirements. In this case, there exists not even one contractual requirement to furnish dishwashers, much less two or more. Not

one of the three bidders who contributed to the record could tell what the Government now says it wanted, and two of those bidders were unaware the Government wanted them to include dishwashers in their bid. The resulting insistence by a military officer at Fort Bragg, acting as contract officer, that dishwashers be supplied has been approved by the Board of Contract Appeals. The Board's denial of an equitable adjustment to Petitioner was arbitrary and capricious. It was unsupported by substantial evidence. It was legally erroneous. The Court of Claims erred in affirming the Board's decision.

As a result, the pertinent ASPRs no longer have the sanction of the Court, the federal statute has been encumbered by three new judge-made conditions in violation of Article One, Section One of the United States Constitution, the effect of that statute has been altered by an illogical construction, and nine points of federal contract law have been ignored.

This is too high a price to pay for government incompetence in the drafting of a bid invitation.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Claims.

Respectfully submitted,

William D. Bryce
Attorney for Petitioner
709 Brown Building
Austin, Texas 78701
512/476-7533

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Robert L. Guyler Company	)	ASBCA No. 20276
	)	
Under Contract No. DACA 21-74-C-0127	)	

APPEARANCES FOR THE APPELLANT: William D. Bryce, Esq.
Austin, Texas

APPEARANCES FOR THE GOVERNMENT: Colonel Richard J. Bednar, JAGC
Chief Trial Attorney
Anne W. Westbrook, Esq.
Engineer Trial Attorney
U. S. Army Engineer District, Savannah

OPINION BY ADMINISTRATIVE JUDGE PARKER

In this case, appellant seeks an equitable adjustment for the cost of providing dishwashers in military housing units it was renovating.

FINDINGS OF FACT

On 22 March 1974, the Department of the Army issued an Invitation for Bids (IFB) for improvements to 400 existing housing units at Fort Bragg, North Carolina.

Section 15A of the specifications for the proposed contract was entitled "plumbing" and set forth the following "Scope of Work" at page 1:

> "(A) WORK INCLUDED: This section includes the plumbing system complete within all buildings and connection to sewer and water services at a point not to exceed 5 feet outside of building walls.
>
> "(B) RELATED WORK NOT INCLUDED IN THIS SECTION: The following items of related work are not included in this section:
>
> (1) Furnishing garbage disposers and dishwashers."

Fixtures to be furnished by the contractor were listed at page 6 of Section 15A. These were: water closet, lavatory, bathtub, kitchen sink and shower outfit. In particular the kitchen sinks were described as follows:

> "(4) Item P-(4), Kitchen sink, stainless steel, flat rim, double compartment, 32 inches by 21 inches by 5-1/4 inches deep. Seamless drawn, 20-gage nickel bearing Type 302 alloy stainless steel, satin finished, sound deadened, integral mounting rim, with spray fitting, cup strainer and plug type 82, and tube type P-trap. Provide single lever faucet constructed of materials conforming to WW-P-541."

Section 11A, entitled "dishwasher and future disposers," provided at page 1:

> "(A) WORK INCLUDED: This section includes the installation of Government furnished dishwashers and rough-in plumbing and electricity for future disposers."

In addition to the foregoing, Special Provision 30 identified dishwashers as Government-furnished property (GFP).

Amendment No. 2 to the IFB, issued on 3 May 1974, added the following subparagraph under the kitchen sink description at page 6 of Section 15A:

> "(a) Special Requirement: Kitchen sinks for all dwelling units shall have special contractor furnished, 'under the sink' type dishwashers. The kitchen sinks shall be double basin specially designed and recommended for use with undersink dishwashers. Refer to detail on plans. Special features shall include the following:
>
> | | |
> |---|---|
> | Overall Length | 33 Inches |
> | Inside Compartment | 5-1/4" Depth |
> | Overall Width | 21-1/4" |
> | Inside Compartment | 14" Length |
> | Width | 15-3/4"" |

Section 15A was amended further by the addition of the following language to the "Installation" paragraph at page 13:

> "(I) DISHWASHERS AND FUTURE GARBAGE DISPOSERS: Provide water, waste, and vent piping for, and make final connections for dishwashers which will be furnished by the Contractor as hereinbefore specified."

Amendment No. 2 also deleted Section 11A (quoted in part, supra) in its entirety, and deleted dishwashers from the list of GFP. However, Amendment No. 2 did not change the "Scope of Work" paragraph of Section 15A, supra, which stated that "furnishing garbage disposers and dishwashers" was related work "not included in this section."

When appellant first received the IFB (prior to Amendment No. 2), it in turn requested bids from various specialty subcontractors for such phases of the work as mechanical, electrical and painting (Tr. 10). The McCarty Corporation elected to bid on the mechanical portion of the work which included the plumbing (Tr. 48). Both Guyler and McCarty were experienced contractors who had frequently worked together on similar renovation projects (Tr. 11, 48).

Appellant's vice president, Mr. Walker, did the estimating for this contract and testified at the hearing. He stated that he did not read the relevant portions of Amendment No. 2 (see above) but merely passed them on to McCarty, the prospective mechanical subcontractor (Tr. 36, 39). He relied on McCarty to discover any changes (Tr. 36).

Mr. McCarty did read the relevant portions of Amendment No. 2 but failed to recognize an added requirement to furnish dishwashers (Tr. 61). McCarty was aware, however, that his company was required to supply the kitchen sinks (Tr. 72) and his shop drawing submission (Ex. G-1) shows that he recognized that the sink as changed was especially designed for use with an "under the sink" dishwasher. We find that McCarty read the "special requirement" paragraph in Amendment No. 2 which clearly described the "under the sink" dishwasher as contractor furnished.

Appellant apparently was awarded the prime contract for the renovation of the housing units on 14 June 1974 (R4, Tab B). That point is not important to the decision and not in controversy. There is nothing in the record which provides us with the contract price.

On 15 July 1974, appellant awarded a subcontract to the McCarty Corporation to perform the mechanical work for a fixed price of $1,088,660 (See App. Ex. 1).

There is no evidence that either Guyler or McCarty raised any question concerning dishwashers prior to the award of appellant's contract. McCarty testified, "I never make inquiries unless I'm the prime contractor" (Tr.69). There were four general contractors other than appellant who submitted bids (Tr. 140). One of them, Community Building Corporation, did not include an allowance for dishwashers in its bid (see Ex. A-4). Some questions about the dishwashers were raised by one or more of the other bidders (Tr. 140), but the record does not reveal which bidders raised the questions, nor what the questions were. Whatever the questions may have been, nothing in the record indicates a response by the Government (Tr. 141).

One of the other bidders was Northeast Construction Company (Tr. 123). Mr. Stegemiller had done the estimating for that company and testified that he had included an allowance for dishwashers in the bid. Exhibit G-2 is a copy of his contemporaneously-prepared estimate sheet which clearly shows that dishwashers were included (Tr. 124). His allowance for dishwashers was based on his own interpretation of Amendment No. 2 and not on questions to the Government (Tr. 127-129). Mr. Stegemiller testified that he had not been misled by the "Scope of Work" clause in Section 15A because he considered it only a general description of the work. He relied on the more detailed specifications, as amended, to prepare his bid (Tr. 125).

On 11 July 1974 (after the award of the prime contract but before appellant awarded the subcontract to McCarty) a pre-construction conference was held at Fort Bragg. Exhibit A-2 is a copy of the minutes of that conference and is signed by the Government's acting area engineer. These minutes reveal that appellant asked the following question:

> "Government-furnished dishwashers were deleted by Amendment No. 2. Is the Government planning to put back a dishwasher in the hole in the kitchen area or are occupants to put their own dishwasher in?"

No answer is recorded. However, Mr. McCarty, who attended the conference, testified as follows:

> "That question was discussed at quite some length. Again, like you mentioned a while ago, this has been some months ago. I don't remember all of the discussion, but there was some discussion about whether the government maintenance fund was going to do it, whether housing had them on hand, whether housing was going to furnish it.
>
> "There was quite a bit of discussion about it, but no one at that time really knew what they were going to do. There was quite a bit of discussion about it, and then I think this was supposed to be checked upon and they'd let us know." (Tr. 75)

Sometime after the pre-construction conference appellant (Mr. Walker) received word from the Government that appellant was required to furnish the dishwashers (Tr. 14-15). Mr. Walker then notified McCarty (Tr. 50-51). McCarty supplied the dishwashers under protest and made a claim through appellant for an equitable adjustment. The claim was denied by the contracting officer and a timely appeal was taken to this Board. Although the Board has not been asked to decide quantum, the parties agree that the cost of the dishwashers was $83,000.

Appellant's position here is that it was misled because Amendment No. 2 failed to modify the "Scope of Work" clause in Section 15A, which stated that furnishing of dishwashers was "related work not included in this section" and that no other section of the specifications stated that the dishwashers were to be furnished by the contractor.

DECISION

Appellant contends that the specifications are ambiguous and cites us to the line of cases which hold that ambiguous contract terms should bear the interpretation reasonably understood by the party who did not draft them, e.g. Peter Kiewit Sons' Co. v. United States, 109 Ct. Cl. 390, 416 (1947).

We agree with the rule; however we note that its application in a particular case is conditioned on whether the contractor can show in the first instance that such ambiguity or conflict "was subtle and not readily discoverable by a reasonable bidder in an examination of the specifications and drawings in the time allotted for bidding," Robert L. Guyler Co., ASBCA No. 20371, 76-1, BCA par. 11,690. If appellant was aware or reasonably should have been aware of the defect when preparing its bid, then a duty arose to request clarification, Beacon Construction Co. v. United States, 161 Ct. Cl. 1, 314 F. 2d 501 (1963); Space Corporation v. United States, 200 Ct. Cl. 1, 470 F. 2d 536 (1972). There is no litmus test for determining whether a defect is patent or subtle and each case must be decided on an ad hoc basis, L. Rosenman Corporation v. United States, 182 Ct. Cl. 586, 390 F. 2d 711 (1968).

In Guyler, supra, we discussed some of the criteria used in determining whether a defect is patent or subtle. In that case the question was whether the contract required paint or vinyl fabric as covering for certain bathroom walls. The finish schedule clearly and unambiguously called for paint, while the elevation drawing indicated vinyl. We found that the contractor had no need to consult the elevation drawing to prepare its bid and did not do so. We also found that the drawings had been prepared by a private firm of architects and reviewed by Government engineers who failed to discover the defect. None of the half dozen bidders discovered the defect. Furthermore, the amount claimed ($20,197) was very small compared to the total contract price ($2,995,675). We held that the defect was not patent.

In this case, we must strain even to consider there was a defect. The whole purpose of Amendment No. 2 was to change the dishwashers from Government-furnished to contractor-furnished equipment. Every reference to "Government-furnished dishwashers" was explicitly deleted. All new references to dishwashers were preceded by the words "contractor furnished." Prior to the amendment, the statement in the "Scope of Work" paragraph in

Section 15A that dishwashers were "related work not included in this section" was accurate since all references to dishwashers were in other sections. However, Amendment No. 2 deleted the other sections and put all references to dishwashers in Section 15A. Under the circumstances the Government's failure to modify the "Scope of Work" paragraph was an obvious oversight. Appellant could not reasonably rely on a pre-existing general statement that dishwashers were "not included in this section" when after Amendment No. 2 they obviously were included there and nowhere else.

We find it unnecessary to discuss the application of the other Guyler criteria. Here, the defect was obvious and observed by appellant's subcontractor, McCarty. If McCarty failed to perceive the change to "contractor-furnished" dishwashers he should have.

The fact that a question was raised at the pre-construction conference is not significant since this was after contract award and appellant could not then modify its bid.

The appeal is denied.

Dated 27 April 1976.

WHILDEN S. PARKER
Administrative Judge
Member of Division No. 6
Armed Services Board of Contract Appeals

I concur

WILLIAM J. ROBERRY
Administrative Judge
Member of Division No. 6
Armed Services Board of Contract Appeals

I concur

WILLIAM D. McCONOUGHEY
Administrative Judge
Member of Division No. 6
Armed Services Board of Contract Appeals

[Signatures continued]

I concur

THOMAS E. BURNS
Administrative Judge
Member pro tem of Division No. 6
Armed Services Board of Contract Appeals

I concur

RICHARD C. SOMMAKKE
Administrative Judge
Chairman, Armed Services
Board of Contract Appeals

I concur

HARRIS J. ANDREWS, JR.
Administrative Judge
Vice Chairman, Armed Services
Board of Contract Appeals

I hereby certify that the foregoing is a true copy of the opinion and decision of the Armed Services Board of Contract Appeals in ASBCA No. 20276, Appeal of Robert L. Guyler Company, rendered in conformance with the Board's Charter.

Dated 10 MAY 1976

GEORGE L. HAWKES, Recorder
Armed Services Board of Contract Appeals

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Robert L. Guyler Company	)	ASBCA No. 20278
	)	
Under Contract No. DACA 21-74-C-0127	)	

APPEARANCES FOR THE APPELLANT: William D. Bryce, Esq.
Austin, Texas

APPEARANCES FOR THE GOVERNMENT: Lt.Colonel Joseph A. Dudzik, Jr., JAGC
Chief Trial Attorney
Anne W. Westbrook, Esq.
Engineer Trial Attorney
U. S. Army Engineer District, Savannah

DECISION ON MOTION FOR RECONSIDERATION

Appellant has moved that we reconsider our decision of 27 April 1976 (76-1 BCA par. 11,893). We held in that decision that appellant was not entitled to recover for the cost of furnishing dishwashers in military housing units it was renovating.

We found in our decision that, when first issued, the invitation for bids (IFB) stated that dishwashers would be furnished by the Government. However, prior to the time bids were submitted, the IFB was amended to delete all references to "government furnished" dishwashers and provide that dishwashers were to be "contractor furnished." After the amendment the only references to dishwashers were contained in Section 15A of the specifications, in which they were clearly identified as contractor-furnished. However, the amendment failed to delete a previous existing general statement in Section 15 that dishwashers were "related work not included in this section."

Appellant's argument now, as it was previously, is that it was entitled to rely on the general statement that dishwashers were "not included in this section." Appellant reasons that since there were no references in other sections to dishwashers that there was no requirement that dishwashers be furnished by the contractor.

We held that appellant could not rely on the previously existing general language to the exclusion of the more specific requirements of the amended specification. This holding is consistent with the rule that a contract must be read as a complete document, Hol-Gar Manufacturing Corp. v. United States, 169 Ct. Cl. 384, 351 F.2d 972 (1965). To accept appellant's argument we would have to ignore the plain language of the amendment which described the dishwashers as contractor-furnished.

In this case the change to contractor-furnished dishwashers was highlighted since it came in an amendment to the solicitation. We think a reasonably intelligent bidder would have noticed the change to contractor-furnished dishwashers and not relied on the previously existing general statement. At the very least, a reasonable and prudent bidder would have made inquiries prior to bidding.

Having reconsidered our previous decision, it is hereby affirmed.

Dated 13 August 1976.

WHILDEN S. PARKER
Administrative Judge
Member of Division No. 6,
Armed Services Board of Contract Appeals

I concur

WILLIAM J. RUBERRY
Administrative Judge
Member of Division No. 6,
Armed Services Board of Contract Appeals

I concur

WILLIAM D. McCONOUGHEY
Administrative Judge
Member of Division No. 6,
Armed Services Board of Contract Appeals

I concur

THOMAS E. BURNS
Administrative Judge
Member pro tem of Division No. 6,
Armed Services Board of Contract Appeals

I concur

RICHARD C. SOLIBAKKE
Administrative Judge
Chairman, Armed Services Board
of Contract Appeals

I concur

HARRIS J. ANDREWS, JR.
Administrative Judge
Vice Chairman, Armed Services
Board of Contract Appeals

I certify that the foregoing is a true copy of the decision and opinion by the Armed Services Board of Contract Appeals in ASBCA No. 20278, Appeal of Robert L. Guyler Company, Decision on Motion for Reconsideration, rendered in conformance with the Board's Charter.

Dated 18 AUG 1976

GEORGE L. HAWKES, Recorder
Armed Services Board of
Contract Appeals

In the United States Court of Claims

No. 51-77

(Decided February 21, 1979)

ROBERT L. GUYLER COMPANY, ON ITS OWN BEHALF AND ON BEHALF OF THE McCARTY CORPORATION v. THE UNITED STATES

William D. Bryce, attorney of record, for plaintiff. *Edward J. Friedlander*, with whom was *Assistant Attorney General Barbara Allen Babcock*, for defendant. *Lawrence S. Smith*, of counsel.

Before DAVIS, KASHIWA and KUNZIG, *Judges*.

ON DEFENDANT'S MOTION AND PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

PER CURIAM: This case comes before the court on plaintiff's request, filed April 4, 1978, for review by the court of the recommended decision of Trial Judge Harry E. Wood, filed February 1, 1978, pursuant to Rule 166(c), on defendant's motion and plaintiff's cross-motion for summary judgment, having been submitted to the court on the briefs and oral argument of counsel. Upon consideration thereof, since the court agrees with the trial judge's recommended decision, as hereinafter set forth, it hereby affirms and adopts the decision as the basis for its

judgment in this case. It is, therefore, concluded as a matter of law that the Board's denial of plaintiff's claim to an equitable adjustment has not been shown to be arbitrary, capricious, unsupported by substantial evidence, or legally erroneous. Accordingly, defendant's motion for summary judgment is granted, plaintiff's cross-motion for summary judgment is denied and the petition is dismissed.

OPINION OF TRIAL JUDGE

WOOD, *Trial Judge:* In this action, before the court for review under the standards of the Wunderlich Act, 41 U.S.C. §§ 321–22 (1970), plaintiff[1] contends that administrative denial[2] of an equitable adjustment for the cost of furnishing some 400 dishwashers in military housing units being renovated at Fort Bragg, North Carolina, is arbitrary, capricious, unsupported by substantial evidence, and erroneous as a matter of law.

Plaintiff's position is that under the *contra proferentem* doctrine,[3] as well as for a considerable number of other reasons, the administrative decisions here under review are defective under Wunderlich Act standards, and that plaintiff is accordingly entitled to judgment herein. Defendant contends that the said decisions are supported by substantial evidence and legally correct, and should, therefore, be upheld. For reasons to be stated, it is concluded that plaintiff is not entitled to recover.

I

The facts found by the Board, or otherwise justified by the administrative record,[4] are as follows:

[1] The action is brought on plaintiff's own behalf and on behalf of the McCarty Corporation, plaintiff's mechanical subcontractor on the contract in suit.

[2] ASBCA No. 20278, 76–1 BCA ¶ 11,893. On reconsideration, the Board affirmed the denial. 76–2 BCA ¶ 12,061. The Board decision was limited to entitlement, the parties having stipulated that "the total damages are $83,000", and that, should the Board find entitlement, "it can remand [the case] for an equitable adjustment in the amount of $83,000."

[3] See, *e.g., George Hyman Constr. Co.* v. *United States*, 215 Ct. Cl. 70, 564 F.2d 939 (1977); *James A. Mann, Inc.* v. *United States*, 210 Ct. Cl. 104, 122–23, 535 F.2d 51, 61 (1976).

[4] See *Merritt-Chapman & Scott Corp.* v. United States, 208 Ct. Cl. 639, 651, 528

On March 22, 1974, defendant, acting through the U. S. Army Engineer District, Mobile, Alabama, issued Invitation for Bids DACA 21–74–B–0105 ("the IFB") for "FY–74 Family Housing Improvements" at Fort Bragg, North Carolina. The original date set for bid opening does not appear in the administrative record,[5] but by an amendment to the IFB a bid opening date of May 23, 1974, was ultimately established.

As originally promulgated, IFB Special Provision 30, "IDENTIFICATION OF GOVERNMENT FURNISHED PROPERTY (1968 SEP)", provided that the government would furnish to the contractor, for incorporation or installation in the work or use in its performance, 540 dishwashers. The Fort Bragg family housing units to be renovated included 400 Wherry Housing Units and 140 Capehart Housing Units, and installation of a dishwasher in each such unit apparently was contemplated.[6]

Section 11A of the specifications attached to the IFB was captioned "DISHWASHERS AND FUTURE DISPOSERS", and provided in part as follows:

1. *SCOPE OF WORK:*

(A) WORK INCLUDED: This section includes the installation of Government furnished dishwashers * * *
(B) RELATED WORK NOT INCLUDED IN THIS SECTION: The following items of related work are not included in this section:

* * * * *

F.2d 1392, 1398 (1976); *Arundel Corp.* v. *United States*, 207 Ct. Cl. 84, 89 n. 3, 515 F.2d 1116, 1118 n. 3 (1975).

[5] An exhibit to defendant's brief (not in the administrative record) indicates an original bid opening date of April 25, 1974.

[6] The administrative record contains neither a complete copy of plaintiff's contract nor a complete copy of the original IFB. A revised IFB description of work suggests that new dishwashers were to be installed only in the 400 Wherry Housing Units, and the fact is that plaintiff's complaint to the Board was limited to 400, rather than 540, dishwashers. In briefs in this court, both parties refer to improvements to 540 housing units. The Board decision, however, referred to improvements to 400 housing units. These (and other) discrepancies are unanswered by the record.

(2) Plumbing work, including installing dishwashers and water, waste, and vent piping and connections to them.

* * * * *

3. *INSTALLATION:*

(A) GENERAL: Dishwashers shall be installed in accordance with requirements of Section 15A, PLUMBING; Section 16A, ELECTRICAL, INTERIOR; and Section 10C, KITCHEN CABINETS AND EQUIPMENT.

As originally promulgated, Section 15A, "PLUMBING", contained the following provisions:

1. *SCOPE OF WORK:*

(A) WORK INCLUDED: This section includes the plumbing system complete within all buildings and connection to sewer and water services at a point not to exceed 5 feet outside of building walls.
(B) RELATED WORK NOT INCLUDED IN THIS SECTION: The following items of related work are not included in this section:

(1) Furnishing garbage disposers and dishwashers.

* * * * *

10. *FIXTURES AND FIXTURE TRIM:*

* * * * *

(D) FIXTURES:

* * * * *

(4) Item P-(4), Kitchen sink, stainless steel, flat rim, double compartment, 32 inches by 21 inches by 5¼ inches deep. * * *[7]

By Amendment 0002, bearing an "effective date" of May 3, 1974, defendant modified the IFB in a number of particulars. Among other things, both Special Provision 30 ("IDENTIFICATION OF GOVERNMENT FURNISHED PROPERTY (1968 SEP)") and Section 11A "DISH-

[7] The kitchen sink, and other fixtures (a water closet, a lavatory, a bathtub, and a shower outfit) specified in Section 15A 10(D) were to be furnished by the contractor.

WASHERS AND FUTURE DISPOSERS" were omitted. Amendment 0002 did not modify the "SCOPE OF WORK" clause of Section 15A "PLUMBING", with the result that Section 15A 1(B) continued to provide that "Furnishing garbage disposers and dishwashers" was "RELATED WORK NOT INCLUDED IN THIS SECTION". Section 15A 10(D)4, listing and describing a kitchen sink, was, however, modified by the following addition:

(a) Special requirement: Kitchen sinks for all dwelling units *shall have special contractor furnished, "under the sink" type dishwashers.* The kitchen sinks shall be double basin specially designed and recommended for use with undersink dishwashers. Refer to detail on plans. Special features shall include the following: * * *[8] [Emphasis supplied.]

Further, Section 15A 11, "INSTALLATION", was modified[9] by making paragraph I, "DISHWASHERS AND FUTURE GARBAGE DISPOSERS" read in pertinent part as follows:

Provide water, waste, and vent piping for, and make final connections for *dishwashers which will be furnished by the Contractor as hereinbefore specified.* [Emphasis supplied.]

Upon receipt of the IFB as originally promulgated, plaintiff solicited bids from various specialty subcontractors, and the McCarty Company ("McCarty") elected to bid on the mechanical portion of the contract work (which included plumbing). Both plaintiff and McCarty were experienced contractors and they had frequently worked together on renovation projects similar to that covered by the IFB.

Plaintiff's vice president and secretary, Mr. Walker, who prepared plaintiff's bid on the contract in suit, testified that, with respect to mechanical work, it was his practice to take the lowest responsible subcontractor bid price and insert it on his bid "recap" sheet. Mr. Walker did not read

[8] The "following" specified, among other things, the overall length and width of the *sink*, and the depth, length and width of its inside compartment.

[9] The original IFB antecedent of Section 15A 11 (if any) is not in the administrative record.

Section 15A as modified by Amendment 0002, but instead relied upon McCarty to go through the said amendment and discover any changes pertaining to mechanical work.

The Board found that Mr. McCarty, president and general manager of McCarty, who prepared the latter's bid on the mechanical portion of the contract work, did read Amendment 0002, including "the 'special requirement' paragraph in Amendment No. 2 which clearly described the 'under the sink' dishwasher as contractor furnished." The Board also found that while Mr. McCarty failed to recognize therefrom "an added requirement to furnish dishwashers * * *", Mr. McCarty was aware both that McCarty was required to furnish kitchen sinks and that "the sink as changed was especially designed for use with an 'under the sink' dishwasher." Those findings deserve finality here.

Thereafter, and apparently on June 14, 1974, defendant, acting through the Department of the Army, awarded to plaintiff a contract (DACA 21-74-C-0127) for improvements to housing units at Fort Bragg, North Carolina. The record does not indicate either the contract date or award price.[10] The record does show that on July 15, 1974, plaintiff entered into a subcontract with McCarty for performance, at a price of $1,088,860, of the mechanical work contemplated by the prime contract.

So far as the record shows, neither plaintiff nor McCarty raised any question concerning dishwashers prior to contract award. Five general contractors (including plaintiff) submitted bids on the contract in suit, and the Board found that one unsuccessful bidder (Community Building Corporation) "did not include an allowance for dishwashers in its bid." One or more of the other general contractors raised questions about the dishwashers, but the record does not reflect either which bidder (or bidders) raised the questions, what questions were so raised, or what, if any,

[10] An "Appeal Data Report" in the administrative record suggests that the contract was awarded by the U. S. Army Engineer District, Savannah, Georgia, at a price of $2,995,678. As the Board noted (with particular respect to the date of contract award), however, these matters are "not important to the decision and not in controversy."

response defendant made thereto. While one unsuccessful bidder did include an allowance for dishwashers in its bid, that allowance was based on the bidder's own interpretation of the contract specifications (as amended), and not on questions to defendant.

On July 11, 1974, following award of the contract to plaintiff, but prior to the subcontract between plaintiff and McCarty, a pre-construction conference was held at Fort Bragg. At that conference, a representative of plaintiff stated that government-furnished dishwashers had been deleted by Amendment 0002, and asked "Is the Government planning to put back a dishwasher in the hole in the kitchen area or are occupants to put their own dishwasher in?" The minutes of the conference do not reflect an answer to that question. Mr. McCarty, who attended the said conference, testified that "There was quite a bit of discussion about it, and then I think this was supposed to be checked upon and they'd let us know."

Some time thereafter, and prior to September 25, 1974, plaintiff was informed by defendant that it was required to furnish dishwashers, and it in turn so notified McCarty. The latter supplied the dishwashers under protest, made claim (through plaintiff) to the contracting officer for an equitable adjustment therefor, and, on denial of that claim, timely appealed to the Board, with the result noted at the outset of this opinion.

II

One of plaintiff's contentions is that the Board decision "contained various errors and misstatements of fact", and that, while plaintiff brought such errors and misstatements to the attention of the Board by motion for reconsideration, the Board "failed or refused to correct any of its factual errors * * *." In its briefs to this court, plaintiff has simply cited its motion for reconsideration, without specification of such alleged factual errors. This approach falls far short of supplying "the substantive particularity, supported by appropriate record references, necessary to overcome the finality that otherwise attaches to findings made by a

Board whose decision is subject to Wunderlich Act review." *Wickham Contracting Co.* v. *United States*, 212 Ct. Cl. 318, 322, 546 F.2d 395, 397 (1976); see also *Jet Constr. Co.* v. *United States*, 209 Ct. Cl. 200, 204, 531 F.2d 538, 540–41 (1976).

"It is not the task of this court to research the administrative record in order to sustain such unsupported allegations." *LSi Service Corp.* v. *United States*, 191 Ct. Cl. 185, 188, 422 F.2d 1334, 1335 (1970). Nonetheless, on careful review of the complaints plaintiff made to the Board and the administrative record, it is concluded that such complaints are devoid of merit. The Board did not commit reversible error in its description of the purpose and effect of Amendment 0002. And, neither the Board's summarization of the testimony of one witness, nor its statement that if Mr. McCarty "failed to perceive the change to 'contractor-furnished' dishwashers he should have", has been shown to be defective in this Wunderlich Act review. *Wickham Contracting Co.* v. *United States*, *supra*; *LSi Service Corp.* v. *United States*, *supra*.

III

Plaintiff contended administratively, and despite a contrary suggestion in its reply brief appears to assert here as well, a right to the benefit of the "general rule that where ambiguous contract language could result in two or more reasonable interpretations the language will be construed against the author." *Merando, Inc.* v. *United States*, 201 Ct. Cl. 19, 21, 475 F.2d 598, 599 (1973); see also *George Hyman Constr. Co.* v. *United States*, 215 Ct. Cl. 70, 80, 564 F.2d 939, 944 (1977). Stressing the "general rule for construing government contracts" and the language of Section 15A 1(B)(1), plaintiff says that defendant "ran the risk that bidders would not * * * include dishwashers in their bid", that plaintiff did not do so, and that defendant "must therefore pay for its own error."

Plaintiff also contends, however, that because of the absence of a dishwasher "specification" in the IFB (as amended) dishwashers were not contractually required;

that even if the amended IFB did contain such a "specification" it "does not suffice" to require plaintiff to furnish dishwashers; that the amended IFB violates Section 2305(b), Title 10, United States Code (1970); and that defendant "violated nine (9) provisions of the Armed Services Procurement Regulations in lieu of specifications"; and "eight (8) applicable rules of contract law", each sufficing to entitle plaintiff to judgment.[11]

The Board rejected plaintiff's claim of right to the benefit of the rule that "ambiguous contract terms should bear the interpretation reasonably understood by the party who did not draft them * * *", holding that plaintiff "could not reasonably rely on a pre-existing general statement that dishwashers were 'not included in this section' when after Amendment No. 2 they obviously were included there and nowhere else", that "the defect was obvious and observed by [plaintiff's] subcontractor, McCarty" and that "If McCarty failed to perceive the change to 'contractor-furnished' dishwashers he should have." ASBCA No. 20278, 76-1 BCA ¶ 11,893, at 57,004. The other contentions plaintiff raised administratively were, however, neither specifically noted nor explicitly resolved by the Board, either in its original decision or on reconsideration.

"This court is not bound by the Board's interpretation of the contract provisions, since such is a matter of law which the court is free to answer independently of the Board's decision." *Merando, Inc.* v. *United States*, *supra*; see also *Maxwell Dynamometer Co.* v. *United States*, 181 Ct. Cl. 607, 626, 386 F.2d 855, 867 (1967). In the process of reaching its own conclusions concerning proper contract meaning, however, the court must nonetheless accord finality to administrative factual findings where, as here, there is no showing that such findings are in any way arbitrary, capricious, or unsupported by substantial evidence. *Wickham Contracting Co.* v. *United States*, *supra*; *Dale Ingram, Inc.* v. *United States*, 201 Ct. Cl. 56, 71, 475 F.2d 1177, 1188 (1973).

[11] In fact, plaintiff's brief includes nine alleged violations of "rules of contract law"

After the issuance of Amendment 0002, there was a clear and obvious conflict between Section 15A 1(B)(1) and other portions of Section 15A as amended. Both prior to and after issuance of Amendment 0002, Section 15A 1(B)(1) stated that the furnishing of dishwashers was related work "not included in this section", but other contract provisions, as modified by Amendment 0002, stated plainly that the contractor *should* furnish dishwashers. On these facts there was a patent and glaring inconsistency in the contract papers. Moreover, plaintiff was, or at the very least should have been, aware of such inconsistency. See *S.O.G. of Arkansas* v. *United States*, 212 Ct. Cl. 125, 546 F.2d 367 (1976); *Wickham Contracting Co.* v. *United States*, *supra*.[12]

The doctrine that before submitting its bid a prospective government contractor should attempt to have defendant resolve any patent conflict in contract terms "is a major device of preventive hygiene; it is designed to avoid just such post-award disputes as this by encouraging contractors to seek clarification before anyone is legally bound." *S.O.G. of Arkansas* v. *United States*, *supra*; see also *Space Corp.* v. *United States*, 200 Ct. Cl. 1, 6, 470 F.2d 536, 539 (1972); *Beacon Constr. Co.* v. *United States*, 161 Ct. Cl. 1, 6–7, 314 F.2d 501, 504 (1963). In the circumstances of this case, plaintiff was under an affirmative obligation to inquire, but failed to do so; accordingly, it cannot rely on "the canon in government procurement that an ambiguous contract, where the ambiguity is not open or glaring, is read against the Government (if it is the author)." *S.O.G. of Arkansas* v. *United States*, *supra*; see also *George Hyman Constr. Co.* v. *United States*, *supra*.

A government "contractor who submits his bid without reading all of specifications does so at his peril. * * * in such a case the contractor assumes the risk of complying with the specifications and cannot complain later on if he

[12] The Board found that although plaintiff's subcontractor "failed to recognize an added requirement to furnish dishwashers * * *", Mr. McCarty had in fact "read the 'special requirement' paragraph in Amendment No. 2 which clearly described the 'under the sink' dishwasher as contractor furnished." Those findings are wholly unchallenged here.

is required to perform the contract in accordance with such specifications * * *." *Dale Ingram, Inc.* v. *United States*, *supra*, 201 Ct. Cl. at 70, 475 F.2d at 1184. The decisions of the contracting officer and the Board that plaintiff was contractually required to furnish dishwashers, while not binding, were legally sound, and on the facts of this case plaintiff is "now barred from recovering on this demand." *Beacon Constr. Co.* v. *United States*, *supra*.

Plaintiff's several other arguments, not addressed by the Board, have been carefully considered. They do not require or justify any different result.

The assertion that there is no "specification" for dishwashers in the IFB (as modified by Amendment 0002), and that, therefore, dishwashers were not required, is specious. The contract documents, as amended, contained a clear statement of a requirement for contractor-furnished "under the sink" dishwashers. Defendant did not take the position that dishwashers the contractor intended to furnish did not meet contract specifications.[13] The situation was, rather, one in which plaintiff did not intend to furnish "under the sink" dishwashers at all, notwithstanding a clear contractual provision that it must do so. Having failed to make any inquiries of defendant respecting dishwashers, plaintiff may not now validly contend that an allegedly inadequate "specification" of the characteristics of such dishwashers relieved it of any obligation to comply with that provision. See *Dale Ingram, Inc.* v. *United States*, *supra*.

Plaintiff further argues that in consequence of Section 2305(b), Title 10, United States Code, providing in substance that an invitation for bids is "invalid and no award may be made" where the specifications in the invitation "do not carry the necessary descriptive language and attachments * * *", plaintiff is entitled to judgment. Section 2305(b) was designed and explicitly intended to preclude a contract award pursuant to an invitation for bids not permitting "full and free competition." All else

[13] Had defendant so contended, a different issue would be presented, and a different result might well obtain.

aside, that statutory provision fails to provide any basis upon which a successful government contractor bidder may escape the adverse financial consequences of his failure to read and understand a clear contractual requirement. *Cf. United States* v. *Testan*, 424 U.S. 392 (1976).

Plaintiff also contends that each of a number of alleged violations of Armed Services Procurement Regulations (ASPR §§ 1-1203.3, 1-1206.1(a) in two respects, 1-1206.2 in two respects, 1-1206.3, 18-107, 1-1206.4(b), and 2-101(i)),[14] "shows plaintiff to be entitled to summary judgment as a matter of law." These provisions need not be discussed in any detail. Most of the sections cited simply do not apply here, and no breach of any relevant provision of ASPR has been shown.

Finally, plaintiff asserts that defendant "violated eight (8) applicable rules of contract law", and that each such "violation" is "material" and entitled plaintiff to judgment.[15] Specifically, plaintiff says that it was misled to its detriment by the amended IFB; that, to prevent unjust enrichment of defendant, plaintiff should be relieved of its bidding "error"; that there was no "meeting of the minds * * * concerning dishwashers * * *"; that the contractual reference to dishwashers "is void for want of particularity"; that since defendant's "true intendment" could not be ascertained "from the four corners of the bid invitation", plaintiff was not required to furnish the dishwashers; that Section 15A contains "fatal irreconcilable and material conflict"; that the dishwashers are "undescribed", and therefore not required; that "plaintiff is entitled to recover under the doctrine of estoppel by representation"; and that if plaintiff made a mistake in not including an amount for dishwashers in its bid, the said mistake "was occasioned by the government and the government is liable for the consequences."

There is no merit to any of these arguments. No misleading by defendant has been shown, or appears. Requiring plaintiff to furnish what it contracted to furnish

[14] Plaintiff's reference is apparently to ASPR § 2-101(a).

[15] As noted heretofore, nine separate assertions in fact appear in plaintiff's brief.

is not unjust enrichment. If there was a mistake as to contract requirements, it was plaintiff's, and furnishes no basis for relief. The contract reference to dishwashers is not void for want of particularity, especially where plaintiff declined to seek any further particularity when it should have done so. As held above, while Section 15A does contain a patent inconsistency, the contract papers clearly set forth a requirement for contractor-furnished "under the sink" dishwashers, and plaintiff may not validly complain here that the dishwashers are "undescribed". Finally, no factual predicate for any "estoppel by representation" exists, and no basis for holding defendant liable for the consequences of any bidding mistake by plaintiff appears.

IV

In sum, the Board's denial of plaintiff's claim to an equitable adjustment has not been shown to be arbitrary, capricious, unsupported by substantial evidence, or legally erroneous. Accordingly, defendant's motion for summary judgment is granted, plaintiff's cross-motion for summary judgment is denied, and the petition is dismissed.

IN THE UNITED STATES COURT OF CLAIMS

No. 51-77

ROBERT L. GUYLER COMPANY,
On its own behalf and on
behalf of THE McCARTY
CORPORATION

v.

THE UNITED STATES

Before DAVIS, Judge, Presiding, KASHIWA and KUNZIG, Judges.

ORDER

This case comes before the court on plaintiff's motion, filed March 12, 1979, for rehearing to alter the judgment and for reargument pursuant to Rule 151(b), with reference to the opinion entered herein on February 21, 1979, dismissing the petition. Upon consideration thereof, together with the response in opposition thereto, without oral argument,

IT IS ORDERED that plaintiff's said motion for rehearing be and the same is denied.

BY THE COURT

APR 6 - 1979

Oscar H. Davis
Judge, Presiding

Appendix D

§ 1.1202 Mandatory specifications.

(a) Except as provided in paragraph (b) of this section, the following specifications are mandatory for use by the Department of Defense in the procurement of supplies and services covered by such specifications:

(1) Federal specifications, unless determined by the Department of Defense to be inapplicable for its use;

(2) Military specifications approved by the Department of Defense for its use; and

(3) Industry documents adopted by the Department of Defense as listed in the Department of Defense Index of Specifications and Standards.

(b) Federal and Military specifications need not be used for the following unless required by Departmental instructions:

(1) Purchase of items for authorized resale except military clothing;

(2) Purchases for construction when nationally recognized industry and technical source specifications and standards are available (see § 18.107 of this chapter); or

(3) Purchase of items in an amount not to exceed $2,500 (multiple small purchases of less than $2,500 of the same item shall not be made for the purpose of avoiding the use of Federal or Military specifications).

(continued next page)

(c) Unless required by Departmental instructions, Federal and Military specifications need not be prepared for use in the below listed procurement actions; however, existing Federal and Military specifications, and adopted industry documents to the extent that they are applicable to the item or service required, shall be used for:

(1) Purchase incident to research and development;

(2) Purchase of items for test or evaluation;

(3) Purchase of laboratory test equipment for use by Government laboratories;

(4) Purchase of one-time procurement items; or

(5) Purchase of items—

(i) For which it is impracticable or uneconomical to prepare a specification (Repetitive use of a purchase description containing the essential characteristics of a specification will be construed as evidence of improper use of this exception.); or

(ii) Where the purchase involves an item which is the product of private development and the provisions of § 1.304 are complied with.

§ 1.1203–3 Specifications and standards not listed in DODISS, data item descriptions not listed in the TD–3 and plans, drawings, and other pertinent documents.

Specifications and standards not listed in the DODISS, and plans, drawings, and other pertinent documents (including new or revised Federal or Military specifications and standards not yet listed in the DODISS) and data item descriptions not listed in the TD–3 normally shall be furnished with the solicitation. When this is not feasible because of the bulk of the documents, the limited number of copies available, or for some other good reason, the solicitation shall include a provision substantially similar to (a) or (b) below, as appropriate.

(a) *Availability of specifications, standards, plans, drawings, data item descriptions, and other pertinent documents.* The specifications, standards, plans, drawings, descriptions and other pertinent documents cited in this solicitation may be obtained by submitting requests to:

(Activity)

(Complete address)

Requests should give the number of the solicitation and the title and number of the specification, standard, plan, drawing or other pertinent document requested, exactly as cited in this solicitation.

(b) *Availability of specifications, standards, plans, drawings, data item descriptions, and other pertinent documents.* The specifications, standards, plans, drawings, description, and other pertinent documents cited in this solicitation may be examined at the following locations:

(Insert complete addresses)

[37 FR 12572, June 27, 1972]

§ 1.1206–1 General.

(a) A purchase description may be used in lieu of a specification when authorized by § 1.1202 (b) and (c) and, subject to the restriction on repetitive use in § 1.1202(c)(5), where no applicable specification exists. An adequate purchase description is an aid to competition and, in the absence of competition, aids in determining the reasonableness of price. A purchase description should set forth the essential physical and functional characteristics of the materials or services required. As many of the following characteristics as are necessary to express the minimum requirements of the Government should be utilized in preparing purchase descriptions:

(1) Common nomenclature;
(2) Kind of material, that is, type, grade, alternatives, etc.;
(3) Electrical data, if any;

(4) Dimensions, size or capacity;
(5) Principles of operation;
(6) Restrictive environmental conditions;
(7) Intended use, including—
(i) Location within an assembly, and
(ii) Essential operating conditions;
(8) Equipment with which the item is to be used;
(9) Other pertinent information that further describes the item, material or service required.

(continued next page)

Purchase descriptions shall not be written so as to specify a product, or a particular feature of a product, peculiar to one manufacturer and thereby preclude consideration of a product manufactured by another company, unless it is determined that the particular feature is essential to the Government's requirements, and that similar products of other companies lacking the particular feature would not meet the minimum requirements for the item. Generally, the minimum acceptable purchase description is the identification of a requirement by use of brand name followed by the words "or equal." This technique should be used only when an adequate specification or more detailed description cannot feasibly be made available by means other than reverse engineering (see § 1.304) in time for the procurement under consideration. Purchase descriptions of services to be procured should outline to the greatest degree practicable the specific services the contractor is expected to perform.

§ 1.1206–2 Brand name or equal purchase descriptions.

(a) Purchase descriptions which contain references to one or more brand name products followed by the words "or equal" may be used only when authorized by § 1.1202 (b) or (c) and in accordance with §§ 1.1206–3 and 1.1206–4. The term "brand name product" means a commercial product described by brand name and make or model number or other appropriate nomenclature by which such product is offered for sale to the public by the particular manufacturer, producer, or distributor. Where feasible, all known acceptable brand name products should be referenced. Where a "brand name or equal" purchase description is used, prospective contractors must be given the opportunity to offer products other than those specifically referenced by brand name if such other products will meet the needs of the Government in essentially the same manner as those referenced. If modifications to manufacturers' standard products to meet the purchase description requirements are anticipated, a minimum of 30 calendar days shall be allowed between issuance of the solicitation and opening of bids or receipts of proposals: *Provided*, That periods of less than 30 days may be set in cases of urgency.

(continued next page)

(b) "Brand name or equal" purchase descriptions should set forth those salient physical, functional, or other characteristics of the referenced products which are essential to the needs of the Government. For example, where interchangeability of parts is required, such requirement should be specified. Purchase descriptions shall contain the following information to the extent available, and include such other information as is necessary to describe the item required:

(1) Complete common generic identification of the item required;

(2) Applicable model, make, or catalog number for each brand name product referenced, and identity of the commercial catalog in which it appears; and

(3) Name of manufacturer, producer, or distributor of each brand name product referenced (and address if company is not well known).

(c) When necessary to describe adequately the item required, an applicable commercial catalog description, or pertinent extracts therefrom, may be used if such description is identified in the invitation for bids or request for proposals as being that of the particular named manufacturer, producer, or distributor. The contracting officer will insure that a copy of any catalogs referenced (except parts catalogs) is available on request for review by bidders at the purchasing office.

[27 F.R. 1693, Feb. 22, 1962, as amended at 35 FR 8428, May 29, 1970; 37 FR 12572, June 27, 1972; 37 FR 21484, Oct. 12, 1972]

§ 1.1206–3 Invitation for bids—"Brand Name or Equal" Purchase Descriptions.

(a) Except as provided in paragraph (c) of this section, when a "brand name or equal" purchase description is included in an invitation for bids, the following shall be inserted after each item so described in the invitation, for completion by the bidder:

Bidding on:
Manufacturer's name _____
Brand _____ No. _____

(b) In addition, the following clause shall be included in the invitation:

BRAND NAME OR EQUAL (Nov. 1961)

(As used in this clause, the term "brand name" includes identification of products by make and model.)

(a) If items called for by this Invitation for Bids have been identified in the Schedule by a "brand name or equal" description, such identification is intended to be descriptive, but not restrictive, and is to indicate the quality and characteristics of products that will be satisfactory. Bids offering "equal" products will be considered for award if such products are clearly identified in the bids and are determined by the Government to be equal in all material respects to the brand name products referenced in the Invitation for Bids.

(b) Unless the bidder clearly indicates in his bid that he is offering an "equal" product, his bid shall be considered as offering a brand name product referenced in the Invitation for Bids.

(c) (1) If the bidder proposes to furnish an "equal" product, the brand name, if any, of the product to be furnished shall be inserted in the space provided in the Invitation for Bids, or such product shall be otherwise clearly identified in the bid. The evaluatoin of bids and the determination as to equality of the product offered shall be the responsibility of the Government and will be based on information furnished by the bidder or identified in his bid, as well as other information reasonably available to the purchasing activity. CAUTION TO BIDDERS. The purchasing activity is not responsible

(continued next page)

for locating or securing any information which is not identified in the bid and reasonably available to the purchasing activity. Accordingly, to insure that sufficient information is available, the bidder must furnish as a part of his bid all descriptive material (such as cuts, illustrations, drawings, or other information) necessary for the purchasing activity to (i) determine whether the product offered meets the requirements of the Invitation for Bids and (ii) establish exactly what the bidder proposes to furnish and what the Government would be binding itself to purchase by making an award. The information furnished may include specific references to information previously furnished or to information otherwise available to the purchasing activity.

(2) If the bidder proposes to modify a product so as to make it conform to the requirements of the Invitation for Bids, he shall (i) include in his bid a clear description of such proposed modifications and (ii) clearly mark any descriptive material to show the proposed modifications.

(3) Modifications proposed after bid opening to make a product conform to a brand name product referenced in the Invitation for Bids will not be considered.

(c) (1) Where component parts of an end item are described in the invitation for bids by a "brand name or equal" purchase description and the contracting officer determines that application of the clause in paragraph (b) of this section to such components parts would be impracticable, the requirements of paragraph (a) of this section shall not apply with respect to such component parts. In such cases, if the clause is included in the Invitation for Bids for other reasons, a statement substantially as follows also shall be included:

The clause entitled "Brand Name or Equal" does not apply to the following component parts:
(List the component parts as to which the clause does not apply.)

(continued next page)

(2) In the alternative, if the contracting officer determines that the clause in paragraph (b), of this section should apply to only certain such component parts, the requirements of paragraph (a) of this section shall apply to such component parts and a statement substantially as follows also shall be included:

The clause entitled "Brand Name or Equal" applies to the following component parts:
(List the component parts to which the clause applies.)

(d) When an invitation for bids contains "brand name or equal" purchase descriptions, bidders who offer brand name products referenced in such descriptions shall not be required to furnish bid samples of the referenced brand name products; however, invitations for bids may require the submission of bid samples in the case of bidders offering "or equal" products.

[27 F.R. 1693, Feb. 22, 1962]

§ 1.1206–4 Bid evaluation and award—"brand name or equal" purchase descriptions.

(a) Bids offering products which differ from brand names products referenced in a "brand name or equal" purchase description shall be considered for award where the contracting officer determines in accordance with the terms of the clause in § 1.1206–3(b) that the offered products are equal in all material respects to the products referenced. Bids shall not be rejected because of minor differences in design, construction, or features which do not affect the suitability of the products for their intended use.

(b) Award documents shall identify, or incorporate by reference an identification of the specific products which the contractor is to furnish. Such identification shall include any brand name and make or model number, descriptive material, and any modifications of brand name products specified in the bid. Included in this requirement are those instances where (1) the description of the end item contains "brand name or equal" purchase descriptions of component parts or of accessories related to the end item and (2) the clause in § 1.1206–3(b) was applicable to such component parts or accessories (see § 1.1206–3(c)).

[27 F.R. 1693, Feb. 22, 1962]

§ 2.101 Meaning of formal advertising.

Formal advertising means procurement by competitive bids and awards as prescribed in this section, and involves the following basic steps:

(a) Preparation of the invitation for bids, describing the requirements of the Government clearly, accurately, and completely, but avoiding unnecessarily restrictive specifications or requirements which might unduly limit the number of bidders. The term "invitation for bids" means the complete assembly of related documents (whether attached or incorporated by reference) furnished prospective bidders for the purpose of bidding;

(b) Publicizing the invitation for bids, through distribution to prospective bidders, posting in public places, and such other means as may be appropriate, in sufficient time to enable prospective bidders to prepare and submit bids before the time set for public opening;

(c) Submission of bids by prospective contractors, and

(d) Awarding the contract, after the bids are publicly opened to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered.

[25 F.R. 14115, Dec. 31, 1960]

§ 18.107 Specifications.

The technical provisions of construction specifications shall be in sufficient detail so that, when used with the applicable drawings and the specifications and standards incorporated by reference, bids can be prepared on a fair and competitive basis. Materials, equipment, components, or systems shall be described, where possible, by reference to documents generally known to industry. The documents include Federal, military, or nationally recognized industry, and technical society specifications and standards. The standards which best represent no more and no less than the Government's minimum needs shall be selected for incorporation by reference into the construction specifications.

[36 F.R. 21168, Nov. 4, 1971]

No. 78-1911

In the Supreme Court of the United States

OCTOBER TERM, 1978

ROBERT L. GUYLER CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1911

ROBERT L. GUYLER CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Claims (Pet. App. 30-42) is reported at 593 F. 2d 406. The opinion of the Armed Services Board of Contract Appeals (Pet. App. 20-26) is reported at 76-1 BCA para. 11,893. The Board's opinion on motion for reconsideration (Pet. App. 27-29) is reported at 76-2 BCA para. 12,061.

JURISDICTION

The judgment of the Court of Claims was entered on February 21, 1979, and a motion for rehearing was denied on April 6, 1979 (Pet. App. 43). The petition for a writ of certiorari was filed on June 25, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether the Court of Claims erred in holding that the Armed Services Board of Contract Appeals' denial of petitioner's claim for an equitable adjustment for costs incurred in performing a government contract was not arbitrary, capricious, unsupported by substantial evidence, or erroneous as a matter of law.

STATEMENT

In this case, petitioner seeks an equitable adjustment for the costs of providing 400 dishwashers in military housing being renovated at Fort Bragg, North Carolina (Pet. App. 20, 31). The Armed Services Board of Contract Appeals denied petitioner's claim and upon appeal the Court of Claims sustained the Board's determination.

In March 1974 the Department of the Army issued an Invitation for Bids (IFB) for renovating military housing at Fort Bragg. The IFB specified that the government would furnish the dishwashers to be installed. Thereafter, the IFB was amended by the addition of two subparagraphs to provide that the contractor would furnish the dishwashers and by the corresponding deletion of two provisions that had obligated the government to supply the dishwashers. However, the amendment failed to change the "Scope of Work" clause, which stated that furnishing dishwashers was not included in work of the contractor (Pet. App. 20-22, 31-34).

Petitioner is a contractor that was invited to bid on the renovation project. Both petitioner and McCarty Corporation, petitioner's subcontractor for the mechanical (including plumbing) work, were experienced contractors that had frequently worked together on similar renovation projects. Petitioner and McCarty were provided with the IFB and the amendment. Petitioner did not read the

amendment, relying instead on McCarty to discover any changes; McCarty did read the amendment but did not recognize the added requirement that the contractor rather than the government would provide the dishwashers (Pet. App. 22, 34-35).

Petitioner subsequently bid on and was awarded the $3 million prime contract for the renovation, and a $1.1 million subcontract for the mechanical work was awarded by petitioner to McCarty. Neither petitioner's nor McCarty's bids reflected the $83,000 cost of the dishwashers. McCarty, as petitioner's subcontractor, was ultimately required by the government to furnish the dishwashers, which it did under protest (Pet. App. 23, 35-36). McCarty then made a claim (through petitioner) to the contracting officer for an equitable adjustment for the cost of the dishwashers. From the contracting officer's adverse determination, petitioner appealed to the Armed Services Board of Contract Appeals which denied the claim initially (*id.* at 20-26) and upon reconsideration (*id.* at 27-29).

Petitioner appealed the Board's decision to the Court of Claims for review under the standards of the Wunderlich Act, 41 U.S.C. 321-322. Petitioner contended that the administrative denial of the equitable adjustment was arbitrary, capricious, unsupported by substantial evidence, and erroneous as a matter of law. The court adopted the recommended decision of its trial judge that the Board's denial of the claim be upheld and the petition be dismissed (Pet. App. 30-42).

ARGUMENT

Petitioner's principal argument is that the IFB was ambiguous on the responsibility of the contractor to furnish the specified dishwashers and that this ambiguity should be construed against the government as the drafter

of the IFB and should entitle petitioner to an equitable adjustment for the costs incurred in supplying the dishwashers. Petitioner also asserts that the Court of Claims' decision constitutes an unconstitutional exercise of legislative power by the judiciary, violates 10 U.S.C. 2305(b), conflicts with the Armed Services Procurement Regulations, and disregards established law governing federal contracts. Notwithstanding these arguments, the Court of Claims' decision is correct, and none of petitioner's contentions warrants review by this Court.

1. The Court of Claims reviewed this case under the standards of the Wunderlich Act, 41 U.S.C. 321-322. It accordingly gave finality to the factual findings of the Armed Services Board of Contract Appeals, which findings the court found not to be arbitrary, capricious, or unsupported by substantial evidence (Pet. App. 38). 41 U.S.C. 321; *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709 (1963); *Jefferson Construction Co.* v. *United States*, 364 F. 2d 420 (Ct. Cl. 1966), cert. denied, 386 U.S. 914 (1967). On the basis of the undisputed facts, both the Board and the court concluded that there was an obvious and glaring conflict between the section of the amended IFB which stated that the furnishing of dishwashers was not work included in the contract and the sections which plainly stated that the contractor should furnish the dishwashers (Pet. App. 24-25, 39). Petitioner either was or should have been aware of this inconsistency (*id.* at 25, 39).

In these circumstances, the law is clear that a bidder who stands idly by cannot later invoke the doctrines that ambiguities in government contracts are resolved against the drafter or that the contract is null and void for vagueness, want of particularity, or lack of a meeting of the minds. To the contrary, when, as here, a bidder is on

notice of an inconsistency on the face of the contract, he is affirmatively obligated to inquire of the government and seek the necessary clarification. See, *e.g.*, *S.O.G. of Arkansas* v. *United States*, 546 F. 2d 367 (Ct. Cl. 1976), and cases cited therein; *Beacon Construction Co.* v. *United States*, 314 F. 2d 501 (Ct. Cl. 1963). This established principle acts as "a major device of preventive hygiene; it is designed to avoid just such post-award disputes as this by encouraging contractors to seek clarification before anyone is legally bound." *S.O.G. of Arkansas* v. *United States*, *supra*, 546 F. 2d at 370-371. See also *Beacon Construction Co.* v. *United States*, *supra*, 314 F. 2d at 504. Accordingly, in submitting its bid without bringing the patent discrepancy to the attention of the contracting officer, petitioner offered its bid at its own risk and was not entitled to an equitable adjustment. *Dale Ingram* v. *United States*, 475 F. 2d 1177 (Ct. Cl. 1973); *Beacon Construction Co.* v. *United States*, *supra*.

2. Petitioner's contentions that the IFB specifications regarding the dishwashers were inadequate to satisfy 10 U.S.C. 2305(b), the Armed Services Procurement Regulations, and the principles of contract law covering federal procurements, are unavailing. This case does not present a question concerning the adequacy of compliance with the terms of a contract, and the government has not taken the position that the dishwashers failed to meet contract specifications (Pet. App. 40). Rather, the only issue is whether respondent is entitled to compensation from the government (in the form of an equitable adjustment) because of an asserted ambiguity on the basic question of which party was to furnish the dishwashers. Thus, petitioner's assertion that the specifications were

inadequate is immaterial here and cannot serve to relieve petitioner altogether of its obligations under the contract.[1]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

AUGUST 1979

---

[1]Moreover, the court below correctly found that petitioner did not demonstrate a violation of any applicable statute, procurement regulation, or principle of contract law (Pet. App. 40-42).

DOJ-1979-08

IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1978

No. 78-1911

ROB'T L. GUYLER CO.
In Its Own Behalf and On Behalf of
THE McCARTY CORPORATION,
Petitioner

v.

THE UNITED STATES OF AMERICA,
Respondent

On
Petition For Writ Of Certiorari
To The United States Court Of Claims

PETITIONER'S REPLY BRIEF TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

William D. Bryce
Attorney at Law
709 Brown Building
Austin, Texas 78701

Attorney for Petitioner

IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1978

No. 78-1911

ROB'T L. GUYLER CO.
In Its Own Behalf and On Behalf of
THE McCARTY CORPORATION,
Petitioner

v.

THE UNITED STATES OF AMERICA,
Respondent

On
Petition For Writ Of Certiorari
To The United States Court of Claims

PETITIONER'S REPLY BRIEF TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The United States correctly reported the opinions below.

JURISDICTION

The United States has correctly stated the jurisdictional facts.

QUESTIONS PRESENTED

The statement of the questions presented in the Government's brief does not sufficiently present the questions. A correct statement of the questions presented is found in Petitioner's Petition, pages 2 and 3.

STATEMENT

The Government's statement in its brief that "Thereafter, the IFB was amended by the addition of two subparagraphs to provide that the contractor would furnish the dishwashers and by the corresponding deletion of two provisions that had obligated the government to supply the dishwashers" suggests that the provisions were substituted one for the other. This is not the case. The Government is referring to random provisions in isolated and disparate parts of the IFB which were not integrated with one another and of which no notice was provided to bidders (Gov. Brief, 2).

On page 3 of its brief, the Government states that "McCarty did read the amendment but did not recognize the added requirement that the contractor rather than the government would provide the dishwashers". It is Petitioner's position that there is no such requirement and that Mr. McCarty

was not required to recognize something which did not exist.

ARGUMENT

1. The Government makes this untrue statement: "Petitioner's principal argument is that the IFB was ambiguous on the responsibility of the contractor to furnish the specified dishwashers and that this ambiguity should be construed against the government as the drafter of the IFB and should entitle petitioner to an equitable adjustment for the costs incurred in supplying the dishwashers." (Gov. Brief, 3-4). At no place in Petitioner's brief will there be found an argument relying upon ambiguity. The Government has simply announced an argument which it believes it can answer and has assigned that argument to the Petitioner. This fact reflects a serious misapprehension of Petitioner's argument by the Government and may explain the Government's failure to answer the arguments raised by Petitioner in its brief.[1]

In truth, the Government did not acknowledge nor did it make a single word of reply to Petitioner's principal argument, which is that "The

---

[1] Petitioner's only reference to "ambiguity" in Petitioner's application is in a negative sense, as follows: "The cases cited by the Board of Contract Appeals and the Court of Claims do not apply, because those cases involve ambiguities or conflicts between two or more otherwise valid contract requirements. In this case, there exists not even one contractual requirement to furnish dishwashers, much less two or more." (Pet. App. 218) (Emphasis added). Thus, Petitioner in its brief has explicitly disaffirmed any reliance upon any argument based on ambiguity.

decision of the United States Court of Claims denying Petitioner the benefit of a Federal Statute is void as a matter of logic and as a matter of law" (Pet. App. 7). Why did the Government refuse to acknowledge this argument? Why did the Government not reply to this argument? Surely if the Government can refute a simple point of logic it will do so; but the Government failed to address this issue, and remained totally silent regarding it. Having failed to meet the point, such should be deemed to have been conceded by the Government.

2. The Government next failed to acknowledge or overcome Petitioner's argument that "the United States Court of Claims invaded the province of the Congress by creating and imposing three conditions for relief under Section 2305(b), Title 10, United States Code. This violates Article One, Section One of the United States Constitution which vests 'all legislative Power' in the Congress" (Pet. App. 8-10). This case presents a direct violation of the Constitution of the United States by the United States Court of Claims. The Government's brief is strangely silent on this argument and does not even show it as an argument made by the Petitioner in this case. The Government is totally silent on this point, presents no cases for the court's review, presents no arguments for the court's review, and refuses to meet the argument or to recognize it in any way. Petitioner's constitutional argument therefore stands unchallenged, unmet, and unanswered.

3. The Government failed to meet or deal with Petitioner's argument that the specifications in the invitation for bids "do not contain the necessary language and are not sufficiently descriptive in language to permit full and free competition between

bidders as required by Article 2305(b), Title 10, United States Code." (Pet. App. 10-11). As a matter of law, the language used in the invitation for bids fails to measure up to the statute, and the statute clearly says that in those circumstances "the invitation is invalid and no award may be made". (Pet. App. 4). Instead of answering this argument, the Government reasserts the false position that this Petitioner is arguing "ambiguity". The Petitioner is not arguing ambiguity, and the Petitioner did not argue that term in the United States Court of Claims, and the Petitioner has nowhere in its appeal based an argument upon ambiguity. The Government has refused to recognize this, and the Government has falsely claimed that the Petitioner has based its argument upon ambiguity. This is not true.

4. Finally, the Government does not meet any of the arguments raised by the Petitioner pertaining to violation of the Armed Services Procurement Regulations by the Government, nor does it address any of the nine (9) familiar principles of contract law long recognized and applied in federal contract cases (Pet. App. 11-18). The Government waives all these aside with this statement: "...[T]he only issue is whether respondent [sic] is entitled to compensation from the government (in the form of an equitable adjustment) because of an asserted ambiguity on the basic question of which party was to furnish the dishwashers." (Gov. Brief, 5). Once again, the Government has returned to its false assertion that Petitioner's arguments are grounded upon "ambiguity".

Since the Government has failed to show that it fulfilled its mandatory compliance with nine

(9) Armed Services Procurement Regulations, and since the Government has failed to defend its violation of nine (9) well known principles of contract law, these points must be taken as having been unmet and unanswered by the Government.

The Government asserts that "This case does not present a question concerning the adequacy of compliance with the terms of a contract" (Gov. Brief, 5). A proper invitation for bids is the Government's part of the contract, a proper bid is the bidder's part. Together, these documents form the contract. The Government failed to fulfill its contractual requirement to provide a proper invitation for bids, as shown in Petitioner's brief, pages 10-18.

CONCLUSION

Since the Government has failed to overcome Petitioner's arguments, and has instead asserted that Petitioner is arguing "ambiguity" when Petitioner is not making that argument, the Government's brief is thus grounded upon a false premise and fails to answer the issues raised by the Petitioner in this case. A Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Claims.

Respectfully submitted,

William D. Bryce
Attorney for Petitioner
709 Brown Building
Austin, Texas 78701
512/476-7533

IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1979

No. 78-1911

ROB'T L. GUYLER CO.
In Its Own Behalf and On Behalf of
THE McCARTY CORPORATION,
Petitioner

v.

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

William D. Bryce
Attorney at Law
709 Brown Building
Austin, Texas 78701

Attorney for Petitioner

IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1979
No. 78-1911

ROB'T L. GUYLER CO.
In Its Own Behalf and On Behalf of
THE McCARTY CORPORATION,
Petitioner

v.

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner respectfully requests that this Court grant rehearing of its order dated October 1, 1979, which denied certiorari, and that the Court now grant certiorari.

The petition for certiorari previously filed herein presented the question of whether or not a federal court may refuse to apply a federal statute

as written (Section 2305(b), Title 10, United States Code (1970)). The petition for certiorari also complained that the federal court had invaded the province of Congress by adding qualifications to the statute. At the time the petition for certiorari was filed, the federal courts were solidly opposed to the judicial errors complained of by Petitioner.

However, on June 27, 1979, two days after the petition for certiorari was filed in this case, the Supreme Court of the United States handed down its decision in United Steelworkers of America, AFL - CIO - CLC v. Brian F. Weber et al., No. 78-432; Kaiser Aluminum & Chemical Corporation v. Brian F. Weber et al., No. 78-435; and United States et al. v. Brian F. Weber et al., No. 78-436, 47 Law Week 4851 (June 27, 1979), on writs of certiorari to the United States Court of Appeals for the Fifth Circuit.

Weber presented a divided and partly silent court. Mr. Justice Brennan delivered the opinion, in which Justices Stewart, White, Marshall and Blackmun joined. Justice Blackmun filed a separate concurring opinion. Chief Justice Burger filed a dissenting opinion. Justice Rehnquist also filed a dissenting opinion, in which Chief Justice Burger joined. Justices Powell and Stevens took no part in the consideration or decision of the cases, so their views are not known.

In Weber, a majority of the Supreme Court held that in statutory construction "it is a 'familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers' " (Id., p. 4853). The majority then examined the legislative history of Title VII, and concluded that the statute does not condemn all affirmative action plans.

The majority opinion, the two dissenting opinions, and the concurring opinion in Weber raise (but do not answer) serious, fundamental questions of how far judges may go in interpreting and applying statutes. The federal court in our present case has gone this far - it has added three requirements to a statute not found in the statute, and has refused to grant relief under the statute, all without a single word of statutory construction and without any examination of the statute's legislative history, but rather strictly upon the will and initiative of the court.

By denying certiorari in this case, the Supreme Court would add to the confusion and the uncertainties created by the Weber case. This is especially so because the petition for rehearing in Weber was denied the same day (October 1, 1979) that the petition for certiorari in our present case was denied. The actions of the Supreme Court in the two cases were thus announced concurrently.

Since Weber has occasioned considerable uncertainty on the subject of the power of courts to construe and apply statutes, compelling reasons are evident why the questions presented in this case should should be reviewed and determined by the Supreme Court. This is especially true in that neither Justice Powell nor Justice Stevens have yet spoken on these issues. The unanswered questions raised by Justice Rehnquist and Chief Justice Burger in their dissenting opinions in Weber need to be resolved.

This case is a perfect vehicle for the resolution of these questions and issues. This case does not involve the emotional and divisive elements inherent in civil rights cases such as Weber: ours is a straightforward government contract case which

presents the full range of statutory construction problems raised by Weber but not resolved in that case. Granting certiorari in the present case would have the following results:

1. Justice Stevens could make known his views regarding statutory construction (he took no part in Weber).

2. Justice Powell could likewise make known his views regarding statutory construction (he took no part in Weber).

3. Justice Burger could expand his views regarding statutory construction (he dissented on the narrow issues in Weber).

4. Justice Rehnquist could further develop his views regarding statutory construction (he also dissented within the narrow issues in Weber).

5. Justice Blackmun could further expand his views as outlined in his concurring opinion in Weber.

6. The remaining Justices could go beyond the limits and bounds of their holding in Weber and announce their views in broader areas of statutory construction than those found in Weber.

"Hard cases make bad law" observed Chief Justice Burger in Weber (id., p. 4858). Ours is not a hard case, and it can unite a fragmented and partially silent Supreme Court.

CONCLUSION

For the reasons set forth in this petition for rehearing, as well as in the petition for certiorari previously filed, rehearing and certiorari should now be granted.

Respectfully submitted,

William D. Bryce
Attorney for Petitioner
709 Brown Building
Austin, Texas 78701
512/476-7533

CERTIFICATE OF COUNSEL

Pursuant to Rule 58, I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in paragraph 2 of Rule 58.

William D. Bryce